Supreme Court, U.S.
FILED
98 904 SEP 30 1998
OFFICE OF THE CLERK

(2)

NO.

SUPREME COURT OF THE UNITED STATES

ATHI NARAYAN

Petitioner,

v.

ST. CHARLES HOSPITAL

Respondent.

Petition for Writ of Certiorari
To The United States Court of
Appeals for the Sixth Circuit

APPENDIX

John G. Rust
4628 Lewis
Toledo OH 43612
(419) 476-0347
Attorney for Petitioner

41PP

APPENDIX

TABLE OF CONTENTS

		Page
1.	Order, U. S. Court of Appeals (Sixth Circuit), Dated July 2, 1998	A1
2.	Opinion and Order, U. S. District Court (Northern District of Ohio, Western Division), Dated Dec. 20, 1996	A3
3.	Notice of Appeal to U. S. Court of Appeals	A35
4.	Federal Civil Rule 56 (C)	A37
5.	42 U.S.C. Section 2000(e)(2)	A38
6.	Sixth Amendment to U. S. Constitution	A39
7.	Certificate of Service	A40

1. ORDER, U. S. COURT OF APPEALS (SIXTH CIRCUIT), DATED JULY 2, 1998

NOT RECOMMENDED FOR PUBLICATION

No. 97-3042

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ATHI NARAYAN, M.D.,	)	
Plaintiff-Appellant.	)	**ON APPEAL FROM THE UNITED STATES**
vs.	)	**DISTRICT COURT FOR THE NORTHERN**
ST. CHARLES HOSPITAL,	)	**DISTRICT OF OHIO**
Defendant-Appellee	)	

BEFORE: KENNEDY, BATCHELDER, Circuit Judges, and HULL, District Judge*

Per Curiam: Plaintiff-Appellant Athi Narayan, M.D., an Indian-born neonatologist of the Hindu religion, appeals the district court's order granting summary judgment to his former employer, St. Charles Hospital and dismissing his complaint claiming numerous civil rights, due process and state law violations. After careful review of the record and the district court's order, we conclude that that order thoroughly and accurately sets out both the undisputed facts and the governing law. Because the issuance of a full opinion would serve no jurisprudential purpose and would be duplicative, we AFFIRM the grant of summary judgment on the basis of the district court's well-reasoned opinion and order.

---

* Hon. Thomas G. Hull, United States District Court for the Eastern District of Tennessee, sitting by designation.

2. OPINION AND ORDER, U.S. DISTRICT COURT (NORTHERN DISTRICT OF OHIO, WESTERN DIVISION), CASE NO. 3:95CV7366, DATED DECEMBER 20, 1996

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Athi Narayan, M.D.,

Plaintiff Case No. 3:95-CV7366

vs.

St. Charles Hospital,

Defendant **OPINION AND ORDER**

POTTER, J.:

This action is before the Court on defendant's motion for summary judgment, plaintiff's amended opposition, defendant's reply and plaintiff's surreply. In

his complaint, plaintiff alleges numerous causes of action. The first four causes of action allege civil rights claims for discrimination based upon race, national origin, and religion in violation of 42 U.S.C. Sections 1981, 1983, and 2000e. Plaintiff's fourth cause of action also alleges a denial of due process in violation of Section 1983. Plaintiff further alleges a breach of oral representations concerning employment, promissory estoppel, breach of contract, unjust enrichment, fraud, defamation, and a violation of the federal antitrust laws. Defendant moves for summary judgment on each count.

> Under the Federal Rules of Civil Procedure, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Supreme Court has recently stated that the inquiry is "whether the evidence presents a

> sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2512 (1986) . . . In reviewing a motion for summary judgment, however, all inferences "'must be viewed in the light most favorable to the party opposing the motion.'" See Matsushita Elec. Indus. Co v. Zenith Radio Corp., 106 S. Ct. 1348, 1356-57 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Ralph Shrader, Inc. v. Diamond International Corp., 833 F. 2d 1210, 1213 (6th Cir. 1987).

> Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated in that decision. If the [nonmoving party's] theory is . . . senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Eastman Kodak Co. v. Image Technical Servs., Inc., 112

S. Ct. 2072, 2083 (1992) (footnote omitted).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [he] believes demonstrate the absence of a genuine issue of material fact." Celotex Corp v. Catrett, 477 U.S. 317, 323 (1986). The substantive law of the case identifies which

[3]

facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. Id. A moving party may discharge its burden "by 'showing' - that is, pointing out to the district court -- that there is an absence of evidence to support the

nonmoving party's case." Celotex, 477 U.S. at 324-325. Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

> [W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." . . . Rule 56(e) therefore requires the nonmoving party to go beyond the pleading and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file." designate "specific facts showing that there is a genuine issue for trial."

Celotex, 477 U.S. at 324.

The undisputed evidence indicates that plaintiff is a neonatologist, born in India and of the Hindu religion. Defendant is St. Charles Hospital (Hospital or defendant),

a private, non-profit corporation. In December, 1987, after being heavily recruited by defendant, plaintiff accepted a written offer to provide neonatal services at the Hospital. The offer stated that "we will develop a contract outlining our specific obligations to each other" and that they would

[4]

"develop the contract with a three year time frame in mind." Defendant's Exhibit A. The offer set forth the specific monetary amount offered of up to $239,000 per year, plus office space and secretarial support. In December, 1987, the parties executed two contracts, a Service Agreement and a Guarantee Agreement, each with a term of three years and each containing an integration clause providing that it contained the entire agreement between the parties which superseded all prior written and oral statements made with respect thereto. Defendant's Exhibits C and D. In addition, each contract provided that

the Hospital could terminate the agreement prior to expiration of three years for cause as set forth in the agreement. See Defendant's Exhibits C Paragraph 16, Exhibit D Paragraph 5.

At the time plaintiff entered into the agreement with defendant, he and his family were well established in Minnesota. He was working as Co-Director of Neonatology at a hospital in St. Paul, Minnesota and was a full faculty member with the Department of Pediatrics at the University of Minnesota. He resigned both positions in order to work at defendant Hospital.

On September 14, 1990, the parties executed a new contract, effective May 16, 1991, entitled "Service Agreement." Defendant's Exhibit E. This contract was for a term of five years and provided, in addition to termination for causes listed in the agreement, that "either party may terminate this Agreement without penalty or cause (I) effective at the end of either the second year of

its term or at the end of the fourth year of its term, by giving the other party no less than six (6) months advance written notice of

[5]

such termination. Id., at Paragraph 15. Under the Agreement, plaintiff was to be compensated in the amount of $249,000 per year. Plaintiff was represented by counsel when this contract was negotiated and executed. His attorney told him that the contract could be terminated without cause. Plaintiff's Depo. at 75.

In August, 1991, defendant entered into a written contract with Dr. Paul Byrne. Exhibit A attached to Defendant's Exhibit F. Dr. Byrne is a white, Catholic neonatologist. Under that agreement, Dr. Byrne was to provide neonatology services at the Hospital and consulting services which included assisting the Hospital

in establishing a Level II neonatal nursery unit[1] and working with officials of the various department of the state and local governments who may be involved in licensing, regulating or approving the operation of a Level II neonatal nursery unit. Id. at Paragraph 1(a) and (e). The contract was for a term of one year and provided for compensation in the total amount of $176,000. Id. at Paragraph 2(c). Dr. Byrne continues to provide services for the Hospital on a month-to-month basis terminable by either party upon thirty days notice.

On May 13, 1994, plaintiff met with Cathleen Nelson, the then Vice President of Operations at the Hospital, to discuss his concerns regarding Dr. Byrne's management of a comatose infant in the nursery. During that meeting, Ms. Nelson informed plaintiff of the decision

---

[1] A level II status for a neonatal unit is a state certification to permit greater levels of care for sick newborn infants.

to terminate his

[6]

contract effective May 16, 1995. Ms. Nelson testified in her deposition that this decision was made several months earlier during budget discussions. Nelson Dep. at 71. Defendant's intent to terminate the contract was confirmed in a letter dated June 7, 1994.

After receiving notice of termination, plaintiff, both individually and through his counsel, attempted to negotiate a new contract. A number of proposals were made and either rejected or not responded to by defendant. Just prior to plaintiff's termination date of May 16, 1995 and after advertising for the position, defendant entered into a contract with the neonatology group at St. Vincent Medical Center to provide coverage for Dr. Byrne when he is unavailable. This contract provides for payment to the neonatologist group at a reduced rate of compensation in the amount of $125,000. The position of

Medical Director of the Neonatology Unit was eliminated at the Hospital.

Plaintiff's civil rights claims set forth in his first four causes of action allege discrimination in violation of Title VII and Section 1981, and a denial of his First Amendment and due process rights in violation of Section 1983.[2] The Court

---

2 With respect to his fourth cause of action, plaintiff appears to argue a state claim of wrongful discharge in violation of public policy prohibiting an employer from discharging an employee who reports concerns of ethical problems relating to another physician's treatment of a patient. See Amended Response of Plaintiff at 26-28. Although a "complaint need not set down in detail all the particularities of a plaintiff's claim," it must, "give the defendant 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Lillard v. Shelby County Bd. of Educ., 76 F. 3d 716, 726 (6th Cir. 1996), citing Gazette v. City of Pontiac, 41 F.3d 1061, 1064 (6th Cir. 1994). Plaintiff alleges that jurisdiction of the Court is, in his fourth cause of action, "invoked pursuant to 42 U.S.C. 1983 and 1981 and is founded on Title 28 U.S.C. Section 1343(3) and (4)." Complaint Paragraph 26. He then alleges that defendant arbitrarily terminated him without a pretermination hearing and for the purpose of

first addresses plaintiff's discrimination claims under Title VII and Section 1981 for which the same evidentiary analysis is used in ruling on a motion for summary judgment.[3] See Richmond v. Board of Regents of Univ. of Minnesota, 957 F 2d 595, 598 (8th Cir. 1992). Absent direct evidence of discrimination, a plaintiff establishes a prima facie case by producing evidence showing: (1) he is

---

retaliating against him for his exercise of his right of free speech. Id. at Paragraph 27. He further alleges that these actions resulted in discrimination against plaintiff because of his race, color and religion; deprivation of rights, privileges and immunities provided by the United States Constitution; deprivation of his liberty and property without due process of law; and interference with plaintiff's employment contract in violation of 42 U.S.C. Section 1981. Id. at Paragraphs 27-28, 30. Because none of these allegations give notice to defendant of a state claim of wrongful discharge in violation of public policy, the Court will not address this argument.

3 As defendant did not argue otherwise, the court will assume for purposes of this motion that plaintiff is an employee of defendant, notwithstanding the independent contractor provision in his contract with defendant.

a member of a protected class; (2) he was qualified for the job and, when plaintiff claims that he was discriminatorily denied a position, that he applied for that position; (3) he suffered an adverse employment decision; and (4) a person outside of the protected class either replaced him or was given the position for which he applied. See

[8]

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Under a disparate treatment theory, the fourth element of the prima facie case is satisfied by showing that a similarly situated non-protected person was treated better. See Mitchell v. Toledo Hospital, 964 F. 2d 577, 582-83 (6th Cir. 1992).

In the case sub judice, plaintiff does not argue the existence of direct evidence of discrimination. Rather, plaintiff argues that he has produced evidence demonstrating a prima facie case of discrimination and that the legitimate business reasons stated by defendant are a

pretext. It is undisputed that plaintiff has satisfied the first three elements of a prima facie case of discriminatory discharge and failure to hire (or negotiate a new contract). However, plaintiff has failed to demonstrate that a non-protected person replaced him or was given a position which he sought.

Plaintiff argues that he was replaced by Dr. Byrne as Medical Director of the Neonatology Unit; however, Dr. Byrne was hired nearly four years before plaintiff's contract was terminated. While Dr. Byrne may perform some of the duties that were performed by plaintiff prior to his termination, he is not designated, nor is he compensated, at Medical Director. Another employee assuming the former duties of a terminated employee does not constitute replacement. Lilley v. BTM Corp., 958 F. 2d 746, 752 (6th Cir. 1992). The position of Medical Director was simply terminated by the Hospital.

In addition, plaintiff offers no evidence that a

similarly situated non-protected person was treated better.

[9]

With respect to the termination of his contract rather than Dr. Byrne's contract, plaintiff was required to demonstrate that he and Dr. Byrne were "similarly situated in all respects." Mitchell, 964 F. 2d at 583. However, the evidence before the Court indicates a large disparity in the compensation required under plaintiff's contract and that required under Dr. Byrne's contract. In addition, Dr. Byrne's agreement with the Hospital was on a month-to-month, rather than long term, basis since July, 1992. Thus, Dr. Byrne and plaintiff were not similarly situated in all respects. With respect to the Hospital's decision to enter into a contract with the neonatologist group at St. Vincent Medical Center, plaintiff cannot show that a non-protected person was treated better as this group included members who are Asian-born Indians. Defendant's Exhibit G. Accordingly, the Court concludes that plaintiff

has failed to establish a prima facie case of discriminatory discharge, and the Court need not address the issue of pretext. Defendant is, therefore, entitled to summary judgment on plaintiff's claims of discrimination in violation of Title VII and Section 1981.

Defendant is also entitled to summary judgment as to plaintiff's claims under Section 1983. To succeed in a Section 1983 action, plaintiff must prove that defendant was acting "under color" of state law. See 42 U.S.C. Section 1983. Plaintiff has offered no evidence or argument that defendant, a private hospital, was acting under color of state law.

Plaintiff's fifth cause of action alleges a breach of "verbal assurances and representations that plaintiff would be employed or affiliated with defendant for a minimum period

[10]

of 20 years, or as long as he elected to be so employed,

and would not be terminated without just cause." Complaint Paragraphs 35, 39. Plaintiff argues that such assurances created an implied "umbrella agreement" that overrode the terms of his written agreement. Plaintiff's sixth cause of action is also based upon the same alleged breach of verbal assurances by defendant. Plaintiff alleges that defendant is promissorily estopped from terminating him "by reason of defendant's breach of its representations to plaintiff as stated in plaintiff's fifth cause of action." Complaint Paragraph 41.

In support of his arguments, plaintiff offers his own affidavit wherein he states that, prior to signing the 1987 agreement and prior to and contemporaneous with signing the 1990 agreement, representations were made by defendant that he could work at the Hospital as long as he wanted to work but that the Hospital was required to contract for a specified term due to "bonding requirements." See Supplemental Affidavit of Plaintiff at

Paragraphs 13, 15a, 17, 19, 24. He further states that the relied upon defendant's representations in 1987 by leaving his employment in Minnesota and moving his family to Toledo and again in 1990 by failing to pursue offers from other hospitals in the midwest. Id. at paragraphs 15, 24.

The Court finds, however, that both of plaintiff's claims are barred by the parol evidence rule. The parol evidence rule precludes the introduction of evidence of conversations that occur prior to or contemporaneous with a written contract and which attempt to vary or contradict the terms of said contract. AmeriTrust Co. v. Murray, 20 Ohio

[11]

App. 3d 333, 335 (Cuyahoga Cty. 1984). The parol evidence rule is not a rule of evidence, but is a rule of substantive contract law employed as an aid to judicial interpretation. Ed Schory & Sons, Inc. v. Francis, 75 Ohio St. 3d 433, 440 (1996); American General Finance

v. Beemer, 73 Ohio App. 3d 684, 687 (Allen Cty. 1991). Thus, when a party seeks to enforce an oral argument in preference to a written agreement on the same subject matter, yet having different terms, the parol evidence rule is applicable. Ed Schory & Sons, Inc., 75 Ohio St. 3d at 440. Moreover, under Ohio law, where the contract is a fully integrated agreement, "courts will give effect to the parties' expressed intentions" and "*[i]ntentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence.*" Construction Interior Sys., Inc v. Marriott Family Restaurants, Inc., 984 F. 2d 749, 754 (6th Cir.), cert. denied 510 U.S. 869 (1993).

In the case sub judice, both of the written contracts signed by plaintiff were fully integrated agreements and were unambiguous as to the term of the contract and conditions under which the contract could be terminated. Thus, plaintiff's attempt to vary the terms of his agreement

with defendant is unavailing. Plaintiff incorrectly relies on Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100 (1985), for the proposition that a promissory estoppel claim is viable even if a fully integrated written agreement exists between the parties. Mers involved an oral employment at will agreement, not a written contract. Furthermore, the alleged promises to Mers came after the initial oral contract of employment. Mers contended that he then relied on the

[12]

promises to his detriment. In the case sub judice, as stated herein, any promises were made prior to the written agreement. Accordingly, defendant is entitled to summary judgment on plaintiff's fifth and sixth causes of action.

The Court also finds plaintiff's attempt to circumvent the parol evidence rule by claiming in his ninth cause of action that defendant fraudulently misrepresented the term of his contract to be unavailing. The 1990

contract clearly states that it was for a term of five years, defendant told plaintiff that it could not contract for longer periods due to certain bonding requirements, plaintiff was represented by counsel during the negotiation of the contract, and plaintiff was told by counsel that the contract could be terminated without cause. Plaintiff had no right to believe that he was actually contracting for a longer term or to rely on oral representations in contravention of those set forth in the written agreement. On these facts, a reasonable factfinder could not conclude that defendant fraudulently misrepresented the term of the contract. defendant is, therefore, entitled to summary judgment on plaintiff's fraud claim.

Plaintiff's seventh cause of action alleges that "plaintiff was employed with defendant under a written agreement" and that "defendant had a duty under said contract to not terminate plaintiff without just cause." Complaint, Paragraphs 44-45. However, the 1990

agreement, by its express terms, gave either party the right to terminate the contract without cause or penalty at the end of the fourth term year by giving a written six-month notice of termination. It is undisputed

[13]

that defendant terminated the contract at the end of the fourth year and gave adequate notice of the termination. Thus, defendant is entitled to summary judgment on this claim. Insofar as plaintiff argues that this claim states a claim for breach of an oral contract, defendant is also entitled to summary judgment as indicated above.

Plaintiff's eighth cause of action alleges that the defendant requested that, in addition to the duties he was retained to perform, he develop and upgrade defendant's Department of Neonatology to a Level II status. He further alleges that he accomplished the Level II certification "all to defendant's benefit, among other benefits to defendant" and that defendant was unjustly

enriched thereby. Complaint Paragraphs 47-48. Plaintiff argues that he was not paid additional monies over and above his salary for his endeavors in obtaining a Level II status or for instituting a sleep apnea program at the Hospital.

Unjust enrichment is a quasi-contract which occurs when a benefits has been conferred by a plaintiff on a defendant, the defendant has knowledge of the benefit, and the circumstances are such that it would be unjust for the defendant to retain the benefit without compensation. Hambleton v. R. G. Barry Corp., 12 Ohio St. 3d 179, 183 (1984). In the case sub judice, assuming plaintiff has satisfied the first two elements set forth above, he has failed to demonstrate circumstances such that a reasonable factfinder could find him entitled to recovery on a theory of unjust enrichment.

[14]

Plaintiff's contract with defendant provides that

the position of Medical Director was established "to assist the Hospital's neonatal nursery unit . . . and its Department of Pediatrics . . . to better provide services to its patients." Defendant's Exhibit E, Paragraph A. Although the contract does not specifically place upon plaintiff the responsibility of obtaining Level II certification or instituting the sleep apnea program, the Court finds that the language of the contract is general enough to encompass these activities. This finding is buttressed by plaintiff's deposition testimony that he knew that obtaining a Level II status in Ohio was largely political and that he told the Hospital that he would do his job as Director of Neonatology, but the Hospital would have to do its political "stuff" to get the Level II. Plaintiff Depo. at 59. There is no indication that plaintiff was involved in the political aspect of obtaining Level II certification. Moreover, plaintiff admits that obtaining the certification was the result of the efforts of many people,

and not of his efforts alone. In any event, working towards obtaining Level II certification and instituting a sleep apnea program falls within the description of the purpose of the position of Medical Director to assist the hospital "to better provide services to its patients." Plaintiff does not contend that he was not paid the salary to which he agreed while acting as Medical Director. On these facts, the Court finds defendant is entitled to summary judgment on plaintiff's claim of unjust enrichment.

Next, defendant argues that thee is no admissible evidence to support plaintiff's claim of defamation set forth

[14]

in his tenth cause of action. Defendant testified in his deposition that evidence supporting this claim was "mostly by hearsay from the nurses and other people." Plaintiff Depo. at 237. Paragraphs 28 and 29 of plaintiff's affidavit

relied upon by plaintiff provide no support for the defamation claim. The Court also finds plaintiff's general reference to nearly sixty pages of deposition testimony of Sally McNichols[4] insufficient to satisfy his burden of "set[ting] forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250. The Court is not required to scour the record in search of an issue of material fact. See Guarino v. Brookfield Twp. Trustees, 980 F. 2d 399, 405 (6th Cir. 1992)[5]

The elements of a defamation claim include a false and defamatory statement, an unprivileged publication to

---

4 The Court assumes that Edna McNichols and Sally McNichols are one and the same.

5 Likewise, plaintiff's general reference throughout his opposition and surreply briefs to deposition testimony of witnesses, some of which consist of multiple volumes, and to plaintiff's 33 page affidavit is insufficient to create an issue of material fact as to any of plaintiff's claims where he has failed to direct the Court to a specific portion of the deposition or affidavit.

a third party, fault on the part of the publisher, and harm caused by the publication. See Akron-Canton Waste Oil, Inc v. Safety-Kleen Oil Serv., Inc., 81 Ohio App. 3d 591, 601 (Summit Cty. 1992). As plaintiff has set forth no evidence of a defamatory statement made to a third party, defendant is entitled to summary judgment on this claim.

[15]

Finally, plaintiff alleges in his eleventh cause of action that defendant entered into a contractual arrangement with St. Vincent's Medical Center to provide personnel to cover for Dr. Byrne when he is unavailable. He further alleges that this arrangement resulted in a restraint of trade and/or a monopolization of neonatal services by defendant and St. Vincent's Medical Center which restricted his ability to work as a neonatologist at defendant Hospital in violation of federal and state antitrust laws. Defendant argues that he evidence does not support a monopolization claim and that plaintiff has

no standing to maintain his antitrust claims as he has not suffered an antitrust injury.

With respect to the monopolization claim, the evidence indicates that defendant entered into a-contract with a professional corporation comprised of neonatologists to provide coverage at the Hospital in Dr. Byrne's absence, and not with St. Vincent's Medical Center. Moreover, plaintiff testified that there are four hospitals in Toledo that maintain neonatal units. Thus, the Court agrees that the record provides no support for plaintiff's monopolization claim.

Plaintiff contends, however, that his claim is primarily directed to the prohibition of contracts in restraint of trade found in Section 1 of the Sherman Act, 15 U.S.C. Section 1. In order to have standing to prosecute this antitrust claim, plaintiff must show more than that defendant's conduct caused him injury. Balaklaw v. Lovell, 14 F. 3d 793, 797 (2d Cir. 1994). As

stated by the Supreme

[17]

Court in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U. S. 477, 489 (1977):

> Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation.

In looking at the cause of a claimed injury, the Court is instructed "to look at whether the conduct was anticompetitive, and if it was not anticompetitive, standing is not shown." HyPoint Technology, Inc. v. Hewlett-Packard Co., 949 F. 2d 874, 877 (6th Cir. 1991). Similarly, under Ohio's antitrust statutes, contained in Ohio Revised Code Chapter 1331, plaintiff's injury "must stem from a competition-reducing aspect or effect of

defendant's behavior." Schweizer v. Riverside Methodist Hospital, 108 Ohio App. 3d 539, 544 (Franklin Cty. 1996).

The relevant markets arguably affected by the contract granted to the neonatologist group rather than to plaintiff are (1) the consumers of neonatal services, and (2) the providers of neonatal services. From the consumers' point of view, it does not appear, and plaintiff does not contend, that the market has changed. According to the deposition testimony of plaintiff, he remained on the staff of several Toledo hospitals after his contract with defendant was terminated and the new contract was granted to the neonatologist group. Even though plaintiff was no longer

[18]

under contract with defendant, consumers were still afforded the same mix of neonatologists as they were previously.

With respect to the providers of neonatal services, plaintiff testified that the market in which neonatologists compete for jobs is nationwide. Plaintiff was, in fact, recruited from a hospital in Minnesota at the time of his original contract in 1987. After termination of his contract with defendant, he practiced at hospitals in Dearborn and Southfield, Michigan; and, in 1996, he began practicing at a hospital in Detroit. Although plaintiff argues that he was injured by defendant's contract with the neonatologist group because it kept him "from entering the field" of neonatology, there is no evidence to support this argument. The Court finds that competition in the market in which neonatologists compete for jobs was unhampered by the contract at issue. As plaintiff has failed to demonstrate the requisite antitrust causation for any injury he might have sustained, he lacks antitrust standing under both federal and state law to challenge defendant's actions. See HyPoint Technology, Inc., 949 F. 2d at 879;

Schweizer, 108 Ohio App. 3d at 544.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendant's motion for summary judgment be, and hereby is, GRANTED

/s/ John W. Potter

Sr. United States District Judge

3. NOTICE OF APPEAL TO U. S. COURT OF APPEALS

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Athi Narayan

Docket Number 3:95CV 7366

v Judge Potter
(District Court Judge)

St. Charles Hospital

Amended
NOTICE OF APPEAL

Notice is hereby given that Plaintiff (Appellant) appeals to the United States Court of Appeals for the Sixth Circuit from the (X) Judgment (____) Order (____) Other (Specify) Summary Judgment Order Dismissing case entered in this action on Dec. 20, 1996.

(Date)

George R. Royer
(Counsel for Appellant)

Address 316 N. Michigan
Suite 416
Toledo, Ohio 43624

Phone: (419) 241-6612

Date January 17, 1997

4. FEDERAL CIVIL RULE 56 (C)

Federal Civil Rule 56(C), which states in part as follows:

> " . . . A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. . ."

5. 42 U.S.C. SECTION 2000(e)(2)

42 U.S.C. 2000e-2 provides in relevant part as follows:

> Employers. It shall be unlawful employment practice for an employer:
>
> 1. to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
>
> 2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

6. SIXTH AMENDMENT TO U. S. CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsary process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

7. CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appendix was mailed to Rolf H. Scheidel, Attorney for Respondent, 1000 Jackson Street, Toledo, Ohio 43624, this 30 day of Nov., 1998.

John G. Rust
Attorney for Petitioner
4628 Lewis
Toledo, OH 43612
(419) 476-0347